No. 80-1222

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE, TENTH JUDICIAL DISTRICT,

Petitioner,

—v.—

ALFRED KOFFLER and WILLIAM HENRY HARRISON, JR.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent Alfred S. Koffler received a BA degree from Brown University in 1949, and his LLB, now a JD, from Harvard Law School in 1952. He was admitted to the New York Bar in 1953. He has practiced in Islip, NY for 23 years. Mr. Koffler served in the Navy from 1944 to 1946. He was elected to the post of Justice of the Peace in the Town of Islip in 1959 and served as Justice until September 1963, when he resigned

to run for Supervisor of the Town (A. 9-10).*/

Respondent William Henry Harrison, Jr., received a BS degree from Michigan State University in 1971, and his law degree from the University of Virginia Law School in 1975. He was admitted to the New York Bar in 1976. He began a clerkship with Mr. Koffler in February, and joined him in partnership in August 1977 (A. 26-27).

The firm is engaged in a general practice, including real estate, matrimonial, negligence and criminal law (A. 11).

Prior to the decision of this Court in Bates v. State of Arizona, in June 1977, neither respondent had ever engaged in any advertising

*/ The symbol "A" refers to the Appendix filed by Respondents in the New York State Court of Appeals.

to promote their legal practice (A. 12-13, 27). When Bates was handed down, the respondents studied the decision and very carefully considered how it might apply to their practice. They believed that advertising might allow them to lower the cost to clients of some standardized legal procedures. Specifically, based upon Mr. Koffler's twenty-three or four years of experience in the field, they believed that title closings could be handled efficiently on a large scale at reduced cost (A. 13-15).

The customary lawyer's fee for title closings in Suffolk County was about one percent of the purchase price of a house or commercial property. That was Mr. Koffler's customary fee, though he charged a minimum fee of $275 regardless of the sale price (A. 16).

The average sale price of a home in Suffolk County was probably about $45,000 (A. 15).

Acting on their belief, the firm, in early August 1977, placed an advertisement in Newsday, a daily newspaper of large circulation in Suffolk and Nassau Counties, offering their services in real estate closings for a fee of $235 regardless of the price of the house. The results were negligible (A. 15). They then considered that if the advertising could be directed specifically to those interested in the sale of a house, the results would improve. As a result of that judgment, the letters at issue in this case were mailed out (A. 17-18). In the period August 24, 1977 to October 24, 1977, respondents mailed out about 7500 letters to homeowners in Suffolk County on their

legal stationery, and several hundred to real estate brokers (A. 19-20).*/

After sending out the letters, the respondents took no further action to contact or communicate with any of the persons to whom the letters were addressed (A. 20-21). They merely waited for replies (A. 20-21).

The replies which were received came entirely by phone (A. 21). Upon receipt of such a call, further information was provided, if requested (A. 22-23), or an appointment was made, and the caller was instructed to bring along the necessary documents, including surveys, deeds, mortgages, certificates of occupancy, and fire underwriting certificates. At the meeting, respondents

*/ Respondents received no complaints from any recipients of the letter. To the contrary, those who called expressed pleasure at the lower fee (A. 20).

would explain their services and ask the client to sign a retainer form, which indicated the services to be performed and the amount of the fee. If the firm was retained, respondents would accept one-half the fee at that time, and the remainder upon the closing (A. 22). If the firm was not retained after the initial meeting, no fee was charged (A. 23).

As a result of the letters, the firm participated in about 200 closings at the $195 fee (A. 24). Though the fee was raised to $235 in January 1978, the firm would only charge $195 to anyone who might come into the office with the August 1977 letter. In fact, that happened only the week prior to the instant hearing, and the client was charged $195 (A. 24-25).

The Appellate Division

unanimously concluded that the respondents' direct-mail advertising could be prohibited, finding two compelling interests which it asserted were sufficient to overcome respondents' First Amendment rights: that the letters invaded the recipients' privacy; and that they "unduly commercialize[d] the legal profession" (A. 65).*/

The New York Court of Appeals unanimously reversed. As to the letters sent to homeowners, it held, based upon the analysis of Bates v. Arizona, 433 U.S. 350 (1977) and Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), that mail advertising by lawyers presented no potential for invasion of privacy, overcommercialization, or conflict of interest (Pet. A. 9) and

*/ The Appellate Division opinion is reported at 70 A.D. 2d 252, 420 N.Y.S. 2d 560.

that as to potential deception, complete suppression violated the First Amendment, since the State's interest "can be adequately protected by more limited regulation" (Pet. A 11). The Court chose to leave consideration of respondents' letters to real estate brokers to another day (Pet. A 4).

CERTIORARI SHOULD BE DENIED

Certiorari should be denied in this case because the New York Court of Appeals, though deciding an important constitutional question, has decided it in complete harmony with applicable decisions of this Court.

Bates v. Arizona, supra., Ohralik v. Ohio State Bar Assn., supra, and In Re Primus, 436 U.S. 412 (1978), read together, require the conclusion that the

respondents' mail advertising is protected commercial speech. Though Bates and Ohralik did not, of course, concern mail advertising, their holdings are readily applicable to this case. Particularly, as Mr. Justice Powell noted in Bates, 433 U.S. at 402, n. 12, as "no distinctions can be drawn between newspapers...and mail circulations."

The valid state interests considered in Bates and Ohralik, included all of those, except invasion of privacy, which were considered by The New York Court of Appeals. See Bates, 433 U.S. at 366, 368-369, 379; Ohralik, 436 U.S. at 461, 464-465. As between the newspaper advertising involved in Bates , and the face-to-face solicitation of recently injured individuals under stressful circumstances involved in Ohralik, it is perfectly clear that advertising by mail is

the perfect equivalent of advertising by newspaper, and shares none of the characteristics of face-to-face solicitation. The effort to draw any equation between mail advertising and Ohralik-type solicitation is baseless and defies common sense, as the New York Court of Appeals recognized (Pet. A 10). As for invasion of recipients' privacy, it was explicitly held in In Re Primus, supra at 435, that a letter of solicitation from a lawyer to a prospective client "involve[s] no appreciable invasion of privacy." Receipt of a letter is to be contrasted, again, with face-to-face solicitation which, as noted in Ohralik, supra at 465, "may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy." The Court contrasted that kind of event with that of "the reader of an advertise-

ment who can effectively avoid further bombardment of his sensibilities by simply averting his eyes..." id, at 465 n. 25, or by disposing of a letter in a trash basket.

We will not belabor further what we believe is the perfectly obvious fact that there can be no rational distinction drawn between newspaper and mail advertising, and that the decision below is analytically indistinguishable from Bates. The Court ought not expend its scarce resources by granting certiorari in this case. The existence of an arguably contrary opinion in a single State, Allison v. Louisiana State Bar, 362 So. 2d 489 (1978), is insufficient reason to grant certiorari where that decision is clearly wrong, where the highest court of another state has upheld mail advertising, Kentucky Bar Association

v. Stuart and Thompson, 568 S.W. 2d 933 (1978), and where the trend to mail advertising in the legal profession is irresistable, as demonstrated by the proposal of The ABA Commission on Evaluation of Professional Standards Model Rules of Professional Conduct (Jan. 30, 1980), in which Proposed Rule 9.2 would explicitly permit advertising by "general direct mailing."

CONCLUSION

For the reasons stated above, certiorari should be denied.

Respectfully submitted,

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